DEVELOPMENT & COMMERCIAL BANK BERHAD

v.

TAN CHENG HUAT

HIGH COURT MALAYA, JOHOR BAHRU
DATO' ARIFIN BIN HJ. JAKA JC
[ORIGINATING MOTION: 25-6 OF 1992]
28 JULY 1994

***LAND LAW**: Section 327(1) NLC - Application to remove private caveat - Whether applicant a body aggrieved - Whether applicant/chargee has priority over respondent/ caveator - Whether the caveat should remain - Onus of proof on caveator - Whether there is a serious question to be tried - Whether there is fraud, misrepresentation or forgery pursuant to s. 340(2) NLC.*

The applicant bank granted loan facilities to Pandangan Selera Sendirian Berhad, the registered proprietor of certain properties including a piece of land in Johore Bahru (the said property).As security for the loan a charge was executed by Pandangan Selera in favour of the applicant which was registered on 4 September 1983. The properties were developed into a housing estate and the respondent was engaged by Pandangan Selera to complete the construction of the houses in the project. The respondent purchased the said property together with a double storey semi detached shophouse to be erected thereon, which was to reduce the outstanding liability of Pandangan Selera to the respondent. In order to protect his interest, the respondent lodged a private caveat over the said property dated 9 June 1985.

Pandangan Selera defaulted in the repayment of the loan and the applicant instituted foreclosure proceedings pursuant to the charge and obtained an order to sell the properties by public auction. The applicant also applied for removal of the caveat. The respondent obtained an order to intervene in the foreclosure proceedings but before the disposal of the application to remove the caveat, the caveat lapsed and the respondent filed a fresh caveat. Upon the refusal of the respondent to remove the second caveat the applicant filed an application for *inter alia* removal of the second caveat.

Counsel for the applicant argued that the applicant as the registered chargee of the land was a body aggrieved under s. 327(1) of the National Land Code (NLC) and had a right to apply for the removal of the caveat under s. 327(2) of the NLC. The respondent contended that as a purchaser he had a caveatable interest in the land and there were triable issues to be determined, therefore, on a balance of convenience the caveat should remain until the disposal of the suit. The respondent further claimed that he had paid the total sum of RM150,000 to Pandangan Selera, being the redemption sum for the discharge of charge of the said property. The applicant conceded such payment was made but denied that the sum was intended as payment of the redemption sum as the applicant had not received any instructions to that effect.

Held:

[1] Under the law and the authorities as they stand the applicant as the chargee is a body aggrieved and is in a position of a registered proprietor and has an indefeasible title to the said land. It is not disputed that the charge created in favour of the applicant was registered earlier than the caveat lodged by the respondent. Therefore the applicant's right as a chargee has priority over the respondent's caveat.

[2] On the evidence the said sum of RM150,000 had not been paid to the applicant. Unless and until the redemption sum is paid to the applicant they are entitled to enforce their rights under the terms of the charge by way of auction sale of the said property. This was exactly what the applicant had done. Under the circumstances, there is no triable issue between the parties.

[3] In order to defeat the title of the applicant, the respondent has to prove the matters stated under s. 340(2) existed, namely; fraud, misrepresentation or forgery. On the facts and evidence disclosed by the affidavits the respondent has failed to prove fraud.

[Application granted].

Cases referred to:
Hajjah Rajiah bte Hj. Man v. Tai Cheng Finance Bhd. [1987] 2 CLJ 154 ***(refd)***
Gondola Motor Credit Sdn. Bhd. v. Almurisi Holdings Sdn. Bhd. [1992] 2 MLJ 650 ***(foll)***
KSM Insuran Bhd. v. Amanah Chase Merchant Bank Bhd. [1992] 1 MLJ 649 ***(foll)***
Macon Engineers Sdn. Bhd. v. Goh Hooi Yin [1976] 2 MLJ 53 ***(foll)***
Eng Mee Yong & Ors. v. V. Letchumanan [1979] 2 MLJ 212 ***(foll)***
Tai Lee Finance Co. Sdn. Bhd. v. Official Assignee & Ors. [1983] 1 MLJ 81 ***(foll)***

Legislation referred to:
National Land Code 1965 ss. 327(1) & (2), 340(1) & (2)

For the applicant - S. Sothi; M/s. Brockett & Cho.
For the respondent - L. Parthiban; M/s. L. Parthiban & Associates.

JUDGMENT

Arifin bin Hj. Jaka JC:

The Development and Commercial Bank Berhad (applicant) granted loan facilities to Pandangan Selera Sendirian Berhad (Pandangan Selera) the registered proprietor of certain properties including one held under H.S.(D) 67951 PTB 13319, Bandar of Johor Bahru, (the said property). As a security for the loan a charge was executed by Pandangan Selera in favour of the applicant over its properties including the said property. The charge was registered with the relevant authority on 4 September 1983 *vide* presentation number 16843/83 vol. 1183 folio 94. Pandangan Selera had also granted to Jercy Sendirian Berhad the absolute right to develop the properties into a housing estate and to sell the houses erected thereon.

The respondent is the purchaser of the said property together with a double storey semi detached shophouse to be erected thereon pursuant to an agreement dated 21 February 1984 for the purchase price of RM293,950.

The respondent was the main contractor engaged by Pandangan Selera to complete the construction of the houses in the project and the sale of the said property to him was to reduce the outstanding liability of Pandangan Selera to him.

To protect his interest the respondent caused a private caveat to be lodged on his behalf by his solicitor Mr. Jegatheeson s/o Namasivayam over the said property *vide* presentation no: 1115/85, vol. 205 folio 76 dated 9 June 1985 (the 1st caveat).

Upon default of repayment of the loan by Pandangan Selera under the terms of the charge the applicant instituted foreclosure proceedings against Pandangan Selera for an order that some of the properties charged including the said property be sold by public auction which order was obtained by the applicant on 27 June 1988. The sale by public auction was fixed on 30 October 1988.

The applicant applied for the removal of the 1st caveat *vide* originating motion no: 32-34-1988. On 8 October 1988 the respondent applied for an order that he be given leave to intervene in the foreclosure proceedings. On 27 September 1989 the Court ordered that the respondent be given leave to intervene and that he be made the respondent in the foreclosure proceedings in place of Mr. Jegatheeson s/o Namasivayam. Before the disposal of the application, the 1st caveat had lapsed and on 10 April 1991 the respondent filed a fresh caveat siri 2481/91 vol. 532 folio 42 (the 2nd caveat). Under these circumstances the learned Counsel for the applicant withdrew the application and requested the respondent to remove the 2nd caveat. On refusal by the respondent to remove the 2nd caveat the applicant filed an application, hence the present application for an order that:

(a) the 2nd caveat be removed,

(b) the Registrar of Titles be directed to remove the aforesaid caveat and that the appropriate memorials of the order to be made in the appropriate Register of Titles.

(c) the respondent do pay compensation to the applicant pursuant to s. 329(1) of the National Land Code 1965 in respect of the 1st and 2nd caveats as may be assessed by the Senior Assistant Registrar, and

(d) costs of the application for the removal of the 1st caveat and of the present application be paid by the respondent to the applicant.

The application is made by way of an originating motion pursuant to s. 327(1) of the National Land Code 1965 (NLC 1965) which provides that any person or body aggrieved by the existence of a private caveat may at any time apply to the Court for an order for its removal and the Court has a discretion to make such an order as it may think fit.

The application is supported by the affidavits of Chang Chee Keong, the Johor Bahru manager of the applicant, affirmed on 22 February 1992, 10 August 1992 and 20 January 1993. The respondent in opposing the application filed an affidavit affirmed on 7 August 1992.

The learned Counsel for the applicant argued that the applicant as the registered chargee of the said land is a body aggrieved under s. 327(1) and has a right to apply for the removal of the caveat under s. 327(2) of the NLC 1965. It cannot be denied that under the law and on the authorities as they stand the applicant as the chargee is a body aggrieved and it is in a position of a registered proprietor and has an indefeasible title to the said land. The applicant has his registered title to rely on as a *prima facie* evidence of his interest on the land. (See *Hajjah Rajiah bte Hj. Man v. Tai Cheng Finance Bhd.* [1987] 2 CLJ 154). Under s. 340(1) of the NLC of 1965 the applicant has an indefeasible title to the said land but the title shall be defeasible in cases provided under subsection (2). For convenience both subsections (1) and (2) of the NLC 1965 are reproduced below:

> 340 (1). The title or interest of any person or body for the time being registered as proprietor of any land, or in whose name any lease, charge or easement is for the time being registered, shall, subject to the following provisions of this section, be indefeasible.
>
> (2). The title or interest of any such person or body shall not be indefeasible:
>
> (a) in any case of fraud or misrepresentation to which the person or body, or any agent of the person or body, was a party or privy; or.
>
> (b) Where registration was obtained by forgery or by means of an insufficient or void instrument; or

(c) Where the title or interest was unlawfully acquired by the person or body in the purported exercise of any power or authority conferred by any written law.

It is manifestly clear that the application concerns with the issue of the indefeasibility of the applicant's titles to the said land and the priority of the charge created in favour of the applicant over the caveat lodged by the respondent. Miss Sothi for the applicant referred to *Gondola Motor Credit Sdn. Bhd. v. Almurisi Holdings Sdn. Bhd.* [1992] 2 MLJ 650 and *KSM Insuran Bhd. v. Amanah Chase Merchant Bank Bhd.* [1992] 1 MLJ 649.

In *Gondola's* case the registered chargee had obtained an order of sale by public auction of the subject property and pursuant to that order the property was sold to the appellant (Gondola). The appellant applied for an order to remove a caveat lodged by the respondent who had entered into an agreement with the chargor to purchase the subject property. The respondent had also obtained a judgment in default of appearance against the chargor. The learned Judge dismissed the application but the appeal to the Supreme Court was allowed and the caveat was ordered to be removed. It was held *inter alia* that a chargee has an indefeasible interest in the subject land by virtue of s. 340(1) of the NLC 1965 upon registration of the charge in its favour unless it is made defeasible by s. 340(2) in cases of fraud, forgery or illegality. It is indeed noteworthy to bear in mind, as submitted by Miss Sothi, that in the present case before the Court the application for the removal of the caveat is made by the chargee himself whereas in *Gondola's* case it was made by the purchaser at the auction sale. The applicant therefore is in a stronger position than the applicant in *Gondola's* case.

In *KSM Insuran's* case the chargee (respondent) applied for the removal of a private caveat lodged by one of the purchasers of the subject property (the appellant). The caveat was lodged after the registration of the charge in favour of the chargee (respondent). In dismissing the appeal and confirming the order of the learned trial Judge removing the private caveat the Supreme Court held *inter alia* that based on the transaction which had been duly registered against the relevant property, the chargees in this case (i.e. respondent) have undisputed title as chargees, unless the matters stated in s. 340(2) of the NLC 1965 are proven to exist. Considering that the respondent's charge had been registered before the entry of the appellant's private caveat, the respondent had priority.

In the instant case before the Court it is in evidence and is not in dispute that the applicant is a registered chargee and that the charge created in favour of the applicant was registered earlier than the caveat lodged by the respondent. It was admitted by the respondent in his affidavit under para. 2(b) that at the time of sale of the said property to him he was fully aware that the said property and other pieces of adjacent properties were charged to the applicant as security for a loan granted to Pandangan Selera.

In *Macon Engineers Sdn. Bhd. v. Goh Hooi Yin* [1976] 2 MLJ 53, Gill (CJ Malaya) when considering the question as to whether the subsequent interest of the appellants overrides the earlier right of the respondent had this to say at p. 55:

> ... the basic rule of law, as in equity, is that estates and interests primarily rank in order of creation. *Qui prior est tempore potior est jure* : he who is earlier in time is stronger in law (see *Snell's Principles of Equity* 27th Edn. p. 45). Where there is a system of registration of titles to land the one who succeeds in the scramble to get on the register emerges victorious.

Following the above established principle it is undoubtedly established that the applicant's right as a chargee has priority over the respondent's caveat.

The respondent resisted the application and asserted that as a purchaser he has a caveatable interest on the said land. Indeed it cannot be denied that the respondent has a caveatable interest in the said land as there was in existence a valid agreement for the sale of the said land: (see *Macon Engineers Sdn. Bhd. v. Goh Hooi Yin* [1976] 2 MLJ 53) where it was held:

> It would seem abundantly clear from the authorities that so long as there is in existence a valid agreement for the sale of land, the purchaser is entitled to lodge a caveat to protect his rights under the contract and to sue for specific performance of the agreement.

The next question to be considered is whether the caveat should remain under the circumstances and facts prevalent in the instant case before this Court. The law applicable in relation to an application for the removal of a caveat under s. 327 of the NLC 1965 is well established and settled.

The onus of proof is on the caveator (respondent) to satisfy the Court that the evidence tendered raised a serious question to be tried and that on the balance of convenience it would be better to maintain the *status quo*. In the celebrated case of *Eng Mee Yong & Ors. v. V. Letchumanan* [1979] 2 MLJ 212 at 215 Lord Diplock stressed:

> In their Lordships' view a distinction must be drawn between cases where the applicant is the registered proprietor of the land (i.e., the caveatee) and cases where the applicant is some other person who claims a right to an interest in it. In the former case the caveatee can rely upon his registered title as *prima facie* evidence of his unfettered right to deal with the land as he pleases; it is for the caveator to satisfy the Court that there are sufficient grounds in fact and law for continuing in force a caveat which prevents his from doing so.

In the present case it is for the respondent to prove that there are "sufficient grounds in fact and law" to enable the Court to exercise its discretion under s. 327(1) of the NLC 1965 to allow the continuance of the caveat. The respondent alleged in his affidavit that there are triable issues to be determined and on a balance of convenience the caveat should remain until the disposal of the suit he had filed against the applicant and Pandangan Selera. The suit referred is civil action registered as High Court Johor Bahru no: 22-293 of 1988 as stated in para. 5 of the respondent's affidavit affirmed on 8 August 1992, the relevant part of which is as follows:

> I have duly filed in this Honourable Court a Writ of Summons against the applicant bank and Pandangan Selera Sdn. Bhd. and have duly served on the applicant bank's solicitors who have filed their memorandum of appearance and statement of defence. In the writ of summons I have given full details of the basis of my claim and the reliefs I seek ...

The claim of the respondent in the said suit is for:

(a) Specific performance of the agreement dated 21 February 1984.

(b) Alternatively a direction that the 2 defendant do deliver the memorandum of discharge of charge and issue document of title to the plaintiff.

(c) Such further relief, enquiries, accounts as this Honourable Court may direct.

(d) Damages and costs.

It seems very clear to me that the respondent's claim in the said suit against the applicant is based on his allegations that the applicant was at all material times fully aware of the sale of the said property to him and had expressly or impliedly consented to the sale notwithstanding the existence of the prior charge as there were arrangements for the payment of redemption of the loan by Pandangan Selera Sdn. Bhd. and at all material times the applicant

and Pandangan Selera were working in cooperation and consent. It was also alleged by the respondent that the applicant was fully aware that he was the main contractor engaged by Pandangan Selera to complete the construction of the houses in this project and the sale of the said property to him was to reduce the outstanding liability of Pandangan Selera to him. (See para. 2(c) of the respondent's affidavit).

The respondent further stressed in para. 2(d) of his affidavit that he had paid the total sum of RM150,000 to Pandangan Selera being redemption sum for the discharge of charge of the said property. This payment to Pandangan Selera is evidenced by the entry in the statement of account of Pandangan Selera with the applicant. In respect of this payment the applicant conceded that it was made but denied that it was intended as payment of the redemption sum in respect of the said property. The applicant had received no instructions either from Pandangan Selera or the respondent that the payment was for redemption of the said property. The payments were treated by the applicant as normal banking deposits made by Pandangan Selera into its own account in its normal course of business. Consequently the respondent in their letter dated 22 May 1986 to the applicant requested for the discharge of charge and the issue documents of title in respect of the said property. In response to this letter the applicant wrote to the respondent's solicitors on 25 July 1986 the relevant portion of which is as follows:

> Dear Sir,
>
> **HS(D) 67951 PTB 13319 Township of Johore Bahru Pandangan Selera Sdn. Bhd.**
>
> We are to inform that unless we receive the redemption sum of RM155,000 in respect of the abovementioned property payable on or before 30 September 1986 we are unable to deliver to you the original document of title together with the memorandum of discharge of charge duly executed.

The respondent did not reply to this letter and neither did he forward the sum of RM150,000 as requested. The attitude of the respondent suggests that he was more concerned to complete the construction of the houses in the project as he was the main contractor obviously for payment.

It appears to me therefore that there is no dispute in this case as regards the redemption sum. It is my finding on the evidence that the said sum of RM150,000 had not been paid to the applicant. Unless and until the redemption sum is paid to the applicant they are entitled to enforce their rights under the terms of the charge by way of auction sale of the said property. This was exactly what the applicant had done. I find therefore under the circumstances and facts in this case there is no triable issue between the respondent and the applicant.

In order to defeat the title of the applicant who was the chargee of the said property the respondent has to prove the matters stated under s. 340(2) existed namely fraud, misrepresentation or forgery. In *Tai Lee Finance Co. Sdn. Bhd. v. Official Assignee & Ors.* [1983] 1 MLJ 81 it was held *inter alia*:

> (2) the law is settled that while s. 340 makes it abundantly clear that the title or interest of a registered proprietor, which includes a chargee, shall be indefeasible, such title or interest shall not be indefeasible, by reason of subsection (2) of s. 340 of the Code in a case of actual fraud;
>
> (3) the question of existence or otherwise of fraud is one of fact to be determined in the light of the facts and circumstances surrounding each particular case. The onus is upon the person alleging fraud to prove fraud not on a balance of probabilities but beyond reasonable doubt;

In the present case I find there was no fraud on the part of the applicant. The particulars against the second defendant (applicant) as stated in the statement of claim in the civil suit filed by the respondent against the applicant and Pandangan Selera and registered proprietor/ chargor do not disclose any fraud at all. As regards payment of RM150,000 direct to Pandangan Selera it could not be taken to be redemption sum for reasons I had stated earlier. The applicant did not in any way commit any act which constitutes a fraud.

Under the circumstances I am inclined to conclude that if at all there is any fraud under the circumstances of the case it should be attributed to Pandangan Selera. The applicant is not a party to it. The respondent should have forwarded the redemption sum direct to the applicant as would be expected in a normal transaction. This the respondent had failed to do and he cannot now be heard to say the applicant is to be blamed. On the facts and on the evidence disclosed by the affidavits filed by and on behalf of the respondent I find the respondent has failed to prove fraud as required under the law to defeat the indefeasible title of the applicant.

For the reasons abovestated, I have no alternative but to give an order in terms of the application.